

Journal of Civil Rights and Economic Development

Volume 6
Issue 1 *Volume 6, 1990, Issue 1*

Article 3

September 1990

Unjust Elections of State Judges Under Section 2 of the Voting Rights Act: League of United Latin American Citizens Council No. 4434 v. Clements

Eileen Campbell

Robert R. Viducich

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Campbell, Eileen and Viducich, Robert R. (1990) "Unjust Elections of State Judges Under Section 2 of the Voting Rights Act: League of United Latin American Citizens Council No. 4434 v. Clements," *Journal of Civil Rights and Economic Development*. Vol. 6 : Iss. 1 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol6/iss1/3>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

UNJUST ELECTIONS OF STATE JUDGES UNDER SECTION 2 OF THE VOTING RIGHTS ACT: *LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434 v. CLEMENTS*

In 1870, Congress enacted the fifteenth amendment to the United States Constitution to guarantee all citizens the right to vote irrespective of their race or color.¹ Nevertheless, voting rights discrimination continued to affect the nation.² In response, Congress passed the Voting Rights Act of 1965 ["VRA"]³ in an effort to secure minorities' right of equal access to the electoral process.⁴ Section 2 of the VRA prohibits a state from implement-

¹ U.S. CONST. amend. XV, §1. Section one of the fifteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* Section two of the fifteenth amendment provides: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §2. See *City of Rome v. United States*, 446 U.S. 156, 173 n.10 (1980); *United Jewish Org. of Williamsburgh v. Carey*, Governor of New York, 430 U.S. 144, 155 n.16 (1977); *Solomon v. Liberty County*, 865 F.2d 1566, 1583 (11th Cir. 1988), *vacated*, 873 F.2d 248 (11th Cir. 1989).

² See Copeland, *The Status of Minority Voting Rights: A Look at Section V Preclearance Protections and Recent Decisions Affecting Multi-member Voting Districts*, 28 HOW. L.J. 417, 417-20 (1985) (detailing methods of disenfranchising black voters after passage of fifteenth amendment); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 523-50 (1973) (noting disenfranchisement of blacks since passage of fifteenth amendment). Cf. Note, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 GA. L. REV. 787, 787 (1989) [hereinafter "Note, *State Judicial Elections*"] ("While over one hundred years have elapsed since the fifteenth amendment [was enacted] . . . a number of election systems and practices persist that effectively dilute the impact of votes cast by minorities.").

³ Voting Rights Act of 1965, 42 U.S.C. § 1971, 1973-1973ff-6 (1982 & Supp. V). The Voting Rights Act was passed pursuant to Section two of the fifteenth amendment, which empowered Congress to "enforce this article [fifteenth amendment] by appropriate legislation." U.S. CONST. amend. XV, § 2. See *Solomon*, 865 F.2d at 1569 (describing Section 2 as "essentially a codification of fifteenth amendment"). See also Derfner, *supra* note 2, at 550. Derfner described the VRA as, "a comprehensive scheme for regulating the details of certain states' election process both as to registration and voting . . ." *Id.*

⁴ See Derfner, *supra* note 2, at 550 (VRA of 1965 enacted in attempt to enforce fifteenth amendment through stringent measures); McKenzie & Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155, 155 (1984) (Con-

ing any voting procedures which, based on race or color, abridge one's right to vote.⁵ In furtherance thereof, Section 2 includes a "results" test⁶ which recognizes a violation based on the "totality

gress passed VRA in 1965 "to root out the blight of voting discrimination and to affirm the fundamental right of each citizen to participate fully in elections"). See also *Fullilove v. Klutznick*, 448 U.S. 448, 546 (1980) (Stevens, J., dissenting) (VRA "addressed the problem of denial of access to the electoral process"); *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1239 (4th Cir. 1989) (VRA's "purpose of securing equal opportunity for minorities to 'elect the representatives of their choice' "). *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1556 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984). The court noted that "[t]he goal of the [VRA] has always been to ensure an effective right of participation The statute is violated if a protected class has 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-14, at 336-40 (1978) (providing brief history of Voting Rights Act of 1965).

⁵ See 42 U.S.C. § 1973 (1982). In 1982, Congress amended Section 2 of the Voting Rights Act in direct response to the Supreme Court's interpretation of that section in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). See *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.) (party need not prove intent after *Bolden*), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991). In *Bolden*, the Supreme Court interpreted Section 2 as requiring plaintiffs to prove discriminatory intent before establishing a violation. *Bolden*, 446 U.S. at 62. Disagreeing with this interpretation, Congress amended the VRA in 1982 by inserting a "results test" to Section 2. See 42 U.S.C. § 1973 (1982). Section 2 of the Voting Rights Act now provides:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
- (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. See generally Blacksher, *Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1982*, 17 URB. LAW. 347 (1985) (in-depth analysis of Section 2's statutory language and legislative history); Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633 (1983) (same); McKenzie & Krauss, *supra* note 4 (same).

⁶ See VRA of 1965, 42 U.S.C. § 1973c (1965). The "results test" provides, in subsection (a), that:

- [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

Unjust Elections of State Judges

of the circumstances.”” While the validity of the VRA has not been questioned, federal courts have disagreed as to whether Section 2 applies to state judicial elections.⁸ Recently, in *League of*

Id.

This results test eases plaintiff's burden of proof by merely requiring proof of discriminatory results of legislative districting rather than proof of legislative intent to discriminate among voters, the pre-amendment test. See VRA of 1965, 42 U.S.C. § 1973 (1965), amended by 42 U.S.C. § 1973c (1982). The intent test which existed under the original Section 2 provided that “[n]o voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color” *Id.* See *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (results test does not place “‘inordinately difficult’ burden of proof on plaintiffs,” as did intent test); *Rogers v. Lodge*, 458 U.S. 613, 621-22 (1982) (proof of discriminatory intent no longer essential to vote dilution claim), *reh’g denied*, 459 U.S. 899 (1982); *Mallory v. Eyrich*, 839 F.2d 275, 279 (6th Cir. 1988) (“[i]t is clearly a less onerous task to prove a violation on the basis of a head count than to be required to show discriminatory intent or purpose”); *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1564 (11th Cir.) (“discriminatory intent need not be shown to establish a violation”), *cert. denied*, 469 U.S. 976 (1984); *McCrary, Discriminatory Intent: The Continuing Relevance of “Purpose” Evidence in Vote-Dilution Lawsuits*, 28 How. L. J. 463, 464 (1985) (old intent standard required greater “investment of time, energy and money” than new results test); A. Miller & M. Packman, *Amended Section 2 of the VRA: What is the Intent of the Results Test?*, 36 EMORY L. REV. 1, 3 (1988) (plaintiff's burden of proof “lightened” under “results” test); *Note*, *State Judicial Elections*, *supra* note 2, at 788 (results standard is easier for plaintiffs to meet than intent test).

Congress amended Section 2 to add the less burdensome “results” test after the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), ruled that plaintiffs must allege and prove deliberate discriminatory acts by state officials. See *Chisom v. Edwards*, 839 F.2d 1056, 1059 (5th Cir.) (no need to prove intent after *Bolden*), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom.* *Houston Lawyers’ Ass’n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991). S. REP. NO. 97-417, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 192 (“[A]mendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court’s decision in *Bolden*.”); Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1205 (1985) (by adding results test, Congress wanted to return to pre-*Bolden* effects standard).

⁷ See *White v. Regester*, 412 U.S. 755, 769 (1973) (Congress adopted Court’s application of “totality of the circumstances” concept); S. REP. NO. 97-417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206-07 (list of relevant factors which create totality of circumstances). See also *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., special concurrence) (whether district is “racially polarized” is “key” factor in totality of circumstances review); Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L.J. 495, 499 (1985) (among typical circumstances which establish vote dilution claim, most relevant is whether district is “racially polarized”).

⁸ Compare *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (Section 2 does not apply to state court judges), *cert. granted sub nom.* *Houston Lawyer’s Ass’n v. Attorney Gen. of Tex.*, 111 S.Ct. 775 (1991) with *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.) (Section 2 does cover state judicial elections), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council*

United Latin American Citizens Council No. 4434 v. Clements ["LULAC"],⁹ the United States Court of Appeals for the Fifth Circuit overruled a two year-old precedent and concluded that Section 2 does not apply to such elections.¹⁰

In *LULAC*, minority voters brought suit against the Texas Attorney General, challenging the at-large election of state court judges as being violative of Section 2 of the VRA.¹¹ Seeking to prevent dilution of their voting strength, plaintiffs argued that the court should replace the county-wide, at-large voting system with single-member¹² elections.¹³ The majority, however, determined that judges are not "representatives" within the meaning of Section 2,¹⁴ and thus, that the VRA did not apply.¹⁵ The court, sitting en banc, concluded that state judicial elections are not covered by the VRA¹⁶ and denied the plaintiffs any relief.¹⁷

This Comment contends that the *LULAC* court erred in holding that Section 2 of the VRA does not apply to state judicial elections. It is submitted that state court judges are "representatives" under the VRA and that they do not hold "single-member" offices. Part I of this Comment will present *LULAC*'s majority, concurring and dissenting opinions. Part II presents a statutory interpretation of "representative" within the meaning of Section 2 in order to show that the majority's construction of this term was flawed. Finally, Part III of this Comment will compare and con-

No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 111 S. Ct. 775 (1991) and Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) (same).

⁹ 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 111 S. Ct. 775 (1991).

¹⁰ See *LULAC*, 914 F.2d at 631.

¹¹ See *id.* at 623. See generally, Note, *supra* note 11, at 144 n.1. ("Under at-large voting, all voters in a district may cast a single vote for each open seat in a given election.").

¹² See *LULAC*, 914 F.2d at 631.

¹³ See *LULAC*, 914 F.2d at 631.

¹⁴ See *id.* at 625-27.

¹⁵ See *id.* at 628.

¹⁶ See *id.* at 623.

¹⁷ See *LULAC*, 914 F.2d at 631. The *LULAC* court also overturned the two year-old Fifth Circuit precedent, *Chisom v. Edwards*, which held that Section 2 applied to state court judges. *Id.* See also *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988), *overruled*, League of United Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 111 S. Ct. 775 (1991).

Unjust Elections of State Judges

trast the concurring and dissenting opinions to show that the concurrence erred in concluding that Section 2 does not apply, notwithstanding its acknowledgement that judges are "representatives" under Section 2.

I. LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL No. 4434 v. CLEMENTS

A. *The Majority Opinion*

Section 2 of the VRA abolishes any voting standard, practice or procedure which denies or hinders a minority voter's right to elect "representatives" of his choice.¹⁸ Accordingly, the meaning of the word "representatives" was the significant issue for the *LULAC* majority.¹⁹ Disregarding previous judicial findings on this is-

¹⁸ See Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982). The United States Attorney General or an "aggrieved person" may initiate a proceeding alleging a violation of Section 2 in a federal district court, where a three-judge court decides if Section 2 applies and if the election standard should be abolished. 42 U.S.C. § 1973b (1982). The losing party may appeal to the United States Supreme Court as a matter of right. 28 U.S.C. § 1253 (1988); 42 U.S.C. § 1973b (1982).

In a Supreme Court case factually similar to *LULAC*, the standard of judicial review of such voter dilution claims under Section 2 was established. See *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986). In *Thornburg*, black voters challenged legislative redistricting by arguing that they were unable to elect representatives of their choice. *Id.* at 30. In reviewing plaintiffs' claims, the Court examined the "totality of the circumstances" and the "impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" *Id.* at 43-44. Significant factors which the Court considered included, *inter alia*, whether the minority voters could compose a majority in a single-member district, whether the minority group is "politically cohesive," whether racial bloc voting exists, and whether the majority's consistent victories at the polls evidence unfair districting, such as racial gerrymandering. *Id.* at 50-51. See generally S. REP. NO. 97-417, 97th Cong., 2nd Sess. 28-30, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206-07 (enumerated list of evidentiary factors which plaintiffs should show to establish violation of Section 2).

¹⁹ See *LULAC*, 914 F.2d at 622. The court defended its limited coverage of the "representatives" issue to the exclusion of many other issues by saying, "[d]im or no, it is the only light available to guide our footsteps, and we have followed it as best we could." *Id.* at 631 n.15.

The concurrence rejected the majority's emphasis on the "representatives" issue and expanded on other issues to conclude as the majority did. *Id.* at 636 (Higginbotham, J., concurring). See *infra* notes 28-35 and accompanying text (in-depth discussion of concurrence). The dissent determined that the majority focused mainly on the "representatives" issue because all other issues did not support the majority and because the majority wanted to apply policy rather than uncover congressional intent. See *LULAC*, 914 F.2d at 654 (Johnson, J., dissenting). See *infra* notes 36-40 and accompanying text (in-depth discussion of dissent).

sue,³⁰ the circuit court ruled that "representatives" had an unequivocal meaning.³¹ Specifically, the court deemed "representatives" to be those officials who subscribe to the views of their constituents in the performance of their offices.³²

The majority arrived at this definition by relying on Section 2's "precise language"³³ and by considering the legislative background of the VRA.³⁴ In particular, the court was persuaded by the fact that, at the time Congress amended Section 2, "judicial officials had never been viewed by any court as representative ones."³⁵ Relying on this omission, the majority proceeded to examine the nature of a judicial office, concluding that judges are not representatives since the performance of their job is not to be influenced by the voting public.³⁶ Thus, the court construed the term to include only legislators and executive officials.³⁷

B. *The Concurring Opinion*

In concurrence, Judge Higginbotham conceded that Section 2 covers judicial elections in general, but not elections for trial/district judges in particular.³⁸ The concurrence predicated this con-

³⁰ See, e.g., *Mallory v. Eyrych*, 839 F.2d 275, 278 (6th Cir. 1988) ("representatives" can be either broadly or narrowly defined); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 517 (M.D. Ala. 1989) (term "representatives" can be applied in restrictive or broad sense); *Martin v. Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987) (for Section 2 purposes, "representatives" used differently than in other contexts); *Haith v. Martin*, 618 F. Supp. 410, 413 (E.D.N.C. 1985) (distinct meanings of "representatives" used in various cases), *aff'd mem.*, 477 U.S. 901 (1986). Cf. *League of United Latin American Citizens Council No. 4434 v. Clements*, 902 F.2d 293, 295 (5th Cir. 1988) (term "representatives" has different levels of meaning), *rev'd*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991).

³¹ See *LULAC*, 914 F.2d at 627-29. *But compare LULAC*, 914 F.2d at 623 ("every federal court which had considered the question had concluded that state judges were not 'representatives'") with *LULAC*, 914 F.2d at 626 n.9 ("a few courts have held that the use of the term 'representatives' in Section 2 does not necessarily exclude judges").

³² See *LULAC*, 914 F.2d at 622.

³³ See *id.* at 624.

³⁴ See *id.* at 624-25, 628 (VRA's statutory background analyzed).

³⁵ *Id.* at 622.

³⁶ See *LULAC*, 914 F.2d at 625-27.

³⁷ See *id.* at 623. The court reasoned that the opinion of the public is not indicative of the judge's decision and, in fact, that the judge's role is to ignore public opinion rather than "represent or carry it out." *Id.* at 622 (emphasis added).

³⁸ See *LULAC*, 914 F.2d at 646-48 (Higginbotham, J., concurring). In Texas, district judges act as trial judges. See generally TEX. CONST. art. V, § 8 (matters where district courts

Unjust Elections of State Judges

clusion on two beliefs: first, that the VRA's purpose was to guarantee minorities the right to have "their interests . . . represented in governmental decisions;"²⁹ and second, that since Texas trial judges exercise full and exclusive authority over their office, they each hold "single-member" offices.³⁰ Relying on these two beliefs, the concurrence, in effect, concluded that applying Section 2 to judicial elections would not further the VRA's purpose, as minorities would not benefit from such application.³¹

Moreover, the concurrence suggested that minorities would be better off if Section 2 was not applied to judicial elections.³² Under the current election system in Texas, minorities have a vote on, and thereby influence, all of the candidate judges running in their respective districts.³³ But under the subdistricting scheme sought by the plaintiffs in *LULAC*, voters could elect, and thereby influence, only those candidates running in their particular subdistrict.³⁴ Lastly, the concurrence noted that applying Section 2 in this case would defy Texas' desire to link a court's jurisdiction with its electoral base, since a judge elected by only one subdistrict would be interpreting law for the whole district, effectively giving that judge jurisdiction over members of outside districts.³⁵

C. *The Dissenting Opinion*

In dissent, Judge Johnson referred to Judge Higginbotham's concurring opinion as "not only wrong" but "dangerous."³⁶ Spe-

have original jurisdiction); LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, THE UNIVERSITY OF TEXAS AT AUSTIN, GUIDE TO TEXAS STATE AGENCIES 287 (1978) ("The district courts constitute the chief trial courts in the Texas judicial system.").

²⁹ *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring). Specifically, the concurrence stated that, "the right secured to minorities under Section 2 of the Voting Rights Act to not have their vote diluted is expressed in the assertion that their interests are to be represented in governmental decisions." *Id.*

³⁰ See *LULAC*, 914 F.2d at 648 (Higginbotham, J., concurring).

³¹ See *id.* at 649, 651 (Higginbotham, J., concurring).

³² See *id.* at 649, 650 (Higginbotham, J., concurring).

³³ See *id.* at 650 (Higginbotham, J., concurring).

³⁴ See *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

³⁵ See *id.* at 651 (Higginbotham, J., concurring).

³⁶ *Id.* at 652 (Johnson, J., dissenting). Judge Johnson elaborated: Judge Higginbotham's concurring opinion ("the concurrence") is scarcely removed from the majority opinion. Like the majority opinion, the concurrence is wholly in-

cifically, the dissent characterized the concurrence as a "creative interpretation" of the VRA which "per se" excludes "the greatest part of the judiciary—state district court judges" - from the Act's coverage.³⁷ The dissent suggested that the concurrence failed to understand the VRA's true purpose.³⁸ In addition, it pointed out that the concurrence, after conceding that judges are "representatives," unjustifiably shifted its attention from the "one casting the vote to the one for whom the vote is cast" by focusing on the particular office for election.³⁹ In the process, the concurrence was deemed to have worsened matters by erroneously concluding that Texas' trial judges hold single-member offices, misapprehending the term's true meaning.⁴⁰

II. STATUTORY INTERPRETATION OF "REPRESENTATIVE" UNDER SECTION 2

It is submitted that, notwithstanding its selective consideration of Section 2's legislative background, the majority, in effect, engaged in an inappropriate and erroneous "plain meaning" interpretation of the term "representative." First, a plain meaning interpretation was inappropriate because the term "representative" is not plain at all, but ambiguous, as conflicting court interpretations indicate.⁴¹ Thus, consistent with fundamental rules of statutory construction,⁴² the court should have considered the VRA's

consistent with the reasoned decisions of numerous courts and the established position of the Attorney General. The concurrence purports to rely upon compelling precedent from another federal court. But in truth, the concurrence is entirely premised upon a single case that is not authority for the concurring opinion's eccentric holding. The scar the concurrence would leave on the Voting Rights Act is no less injurious than that the majority inflicts

Id.

³⁷ *Id.* at 655 (Johnson, J., dissenting).

³⁸ *See id.* at 658 (Johnson, J., dissenting).

³⁹ *LULAC*, 914 F.2d at 656 (Johnson, J., dissenting).

⁴⁰ *See id.* at 657 (Johnson, J., dissenting).

⁴¹ *See supra* note 20 (setting forth cases in which courts found inconsistent definitions of term "representative").

⁴² *See United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940) ("[w]hen aid to construction of the meaning of words . . . is available, there certainly can be no 'rule of law' which forbids its use"); *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 (1934) (where plain meaning of Act is insufficient to reveal legislative intent, legislative history must be reviewed); *Popovici v. Agler*, 280 U.S. 379, 383 (1930) (where evidence of legislative intent exists and plain meaning yields unreasonable results, Act is to be construed in

Unjust Elections of State Judges

legislative history more extensively instead of dismissing significant pieces of legislative intent as “bird shot contentions.”⁴³ Second, even assuming, *arguendo*, that a mere plain meaning interpretation was appropriate, the majority’s interpretation was erroneous, as it dismissed significant points of statutory construction⁴⁴ and, consequently, arrived at a distorted interpretation of the meaning of “representative.”⁴⁵ Accordingly, it is further submitted that even a plain meaning interpretation should not have led the majority to conclude that judges are not “representatives.”⁴⁶

A. Legislative History of Section 2

Examining Section 2’s legislative history, Congress’ failure to expressly exclude judicial elections serves as highly persuasive evidence that it did, indeed, intend to incorporate state judicial elections into Section 2.⁴⁷ Furthermore, indirect support for including

accordance with legislative policy); *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17-18 (1904) (intention of legislature “governs” in statutory interpretation).

The *LULAC* court circumvented review of the legislative history by claiming “representatives” was unambiguous in meaning and, therefore, resort to legislative history was unnecessary. See *LULAC*, 914 F.2d at 631. Yet, even when the meaning of statutory language is plain, courts must review the legislative history of the statute. See *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (when evidence of legislative intent exists, court must give it effect); *Flora v. United States*, 362 U.S. 145, 151 (1960) (to reveal congressional intent, court first looks at statutory language and then to other pertinent materials); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (although statutory language is plain, court should review other evidence of legislative intent in order to clarify meaning of statute). But see *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966) (most persuasive evidence of legislative intent is plain meaning of statute, and other materials of legislative intent are only sometimes to be reviewed); *Jay v. Boyd*, 351 U.S. 345, 357 (1956) (“We must adopt the plain meaning of a statute, however severe the consequences”); *Ex Parte Collett*, 337 U.S. 55, 61 (1949) (when statutory language is clear, do not refer to legislative history); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (when meaning of statute is plain, do not consider legislative intent).

⁴³ *LULAC*, 914 F.2d at 630.

⁴⁴ See *id.* at 629-30. The court dismissed the plaintiff’s countervailing points of statutory construction as “attenuated and derivative in nature” and as “bird shot contentions.” *Id.*

⁴⁵ See *infra* note 80 and accompanying text (court equated “representative” with “advocate”).

⁴⁶ See *infra* notes 69-89 and accompanying text (plain meaning analysis of “representative”).

⁴⁷ See *United States v. Board of Comm’rs of Sheffield*, 435 U.S. 110, 121 (1978) (where Congress did not “clearly manifest an intention to restrict” section, Court did not exclude members at issue); *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988) (review of legislative history does not reveal congressional intent to exclude judges); Note, *State Judicial*

judges under Section 2's scope exists in the Senate Report, where Senator Orrin Hatch specifically testified as to such intended inclusion.⁴⁸ Moreover, at the Senate and House hearings, Congress viewed statistics charting the growth in numbers of minority judges elected since the passage of the VRA.⁴⁹ The fact that no member of Congress objected to Senator Hatch's testimony or to the charts can be interpreted as an implied approval of including judicial elections within the scope of Section 2.

Examination of the Senate Report also reveals that Congress often used various terms descriptive of the judiciary interchangeably with "representative."⁵⁰ Such an inconsistent use of the word "representative" further shows that Congress did not intend to exclude judges from the reach of Section 2.⁵¹ The highly influen-

Elections, supra note 2, at 798 (some courts reason that since judiciary not expressly excluded in legislative history, judiciary should not be excluded from Section 2).

Some courts have taken the opposite view and reasoned that because the legislative history does not explicitly include judges in Section 2, Congress intended to exclude judges. See, e.g., *LULAC*, 914 F.2d at 630 (lack of legislative history supports plain meaning).

⁴⁸ See S. REP. NO. 97-417, 97th Cong., 2d Sess. 151, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 323. Senator Hatch stated, "It is important to emphasize [that] . . . 'political subdivision' [in Section 2] encompasses all governmental units, including . . . judicial districts." *Id.* Significantly, there was no report of any senator having objected to this statement. *Id.* See also *Chisom v. Edwards*, 839 F.2d 1056, 1062 (5th Cir.) ("[W]e believe the statement provides persuasive evidence of congressional understanding and believe that Section 2 applies to the judiciary, especially since the Report is silent as to any dissent by senators from Senator Hatch's description."), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991).

⁴⁹ See *Voting Rights Act: Hearings on S.53, S.1761, S.1976, S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 669, 748, 788-89 (1982) (statistics detailing increases in elected minority officials under VRA). No senators protested such a review of judicial elections in considering the amendment. See *Chisom v. Edwards*, 839 F.2d 1056, 1063 (5th Cir.) (congressional silence seen as persuasive evidence), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991).

⁵⁰ See, e.g., S. REP. NO. 97-417, 97th Cong., 2d Sess. 16 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS, 177, 193 ("elected officials"); *id.* at 29, n.115 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 207 n.115 ("candidates"); *id.* at 30 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 207 (same); *id.* at 67 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 246 (same).

⁵¹ See *Mallory v. Eyrych*, 839 F.2d 275, 280 (6th Cir. 1988) (interchangeability of terms shows "representatives" was not "narrowing term of art"); *Chisom v. Edwards*, 839 F.2d 1056, 1063 (5th Cir.) (Congress did not intentionally place "representatives" in Section 2 to exclude judges), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert.*

Unjust Elections of State Judges

tial testimony of the United States Attorney General concerning the VRA's enactment corroborates this conclusion.

Testifying before the Subcommittee of the House Judiciary Committee prior to the VRA's enactment, the United States Attorney General asserted that Section 2 covered judicial elections.⁵³ He stated, "every election in which registered voters are permitted to vote would be covered" by the VRA.⁵⁴ Since the VRA expressly grants the Attorney General standing to bring claims under Section 2 and to preclear new voting procedures under Section 5,⁵⁴ the court should have considered his views highly authoritative. Instead, the court dismissed these factors and produced a list of cases that accord with its conclusion.⁵⁵ However, scrutiny of *White v. Regester*,⁵⁶ the case on which Congress modeled the amended version of Section 2, proves the majority, and those courts upon which the majority relied, wrong.

As the majority conceded, Congress took the amendment to Section 2 almost verbatim from a passage in the earlier Supreme Court case of *White v. Regester*.⁵⁷ In adopting the *White* Court's lan-

granted sub nom. *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991).

⁵³ See *Voting Rights: Hearing Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong., 1st Sess. 21 (1965) (Attorney General's position of Section 2 and its applicability to state judicial elections).

Since the passage of the Act in 1965, the United States Attorney General's office has repeatedly found that Section 2 applies to judges. See *LULAC*, 914 F.2d at 652 (Johnson, J., dissenting).

⁵⁴ See *Voting Rights: Hearing Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong., 1st Sess. 21 (1965) (position of United States Attorney General).

⁵⁵ See *LULAC*, 914 F.2d at 645 (Higginbotham, J., concurring) (discussing Section 5's requirements).

⁵⁶ See *id.* at 629 n.9. These cases, however, are completely distinguishable, for as the majority itself admitted, most were decided "in the context of . . . whether the one-man, one vote rubric applied to judicial elections." *Id.* See also *Mallory v. Eyrich*, 839 F.2d 275, 277 (6th Cir. 1988) ("The one-man, one vote cases do not control cases brought under the Voting Rights Act.").

⁵⁷ 412 U.S. 755 (1973).

⁵⁸ See *White v. Regester*, 412 U.S. 755, 766 (1973) (use of "results" test in finding voting process discriminatory). In *White*, it was set forth:

The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. (emphasis added). See *supra* note 5 (setting forth statutory language of Section 2(b) of VRA, which enunciates standard to determine if violation of subdivision (a) "results" test had occurred). See also S. REP. NO. 97-417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S.

guage, Congress changed "to elect legislators of their choice," Section 2's original wording, to "to elect representatives of their choice."⁵⁸ The *LULAC* court, however, concluded that Congress broadened the scope of "representatives" to include both legislators and executive officials, but that the change was not so all-encompassing as to include judges.⁵⁹ However, it has been suggested that it is more reasonable and logical to conclude that, since Congress chose an expansive term, "representatives," to replace "legislators" and did not explicitly exclude judges, it intended to include judges as "representatives."⁶⁰

CODE CONG. & ADMIN. NEWS 177, 205 ("subsection (b) embodies the test laid down in *White*"); *id.* at 28, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206 (main purpose of amendment was to ease plaintiffs' burden of proof from establishing intent to discriminate to proving only discriminatory results).

⁵⁸ See Voting Rights Act of 1965, 42 U.S.C. § 1973b (1982). See also *supra* note 5 (setting forth language of Section 2 of VRA).

⁵⁹ See *LULAC*, 914 F.2d at 628-29. The majority concluded that the word "representatives" was broadened only so far as to include legislators and executive officials. *Id.* The court suggested that Congress is presumed to know of the judicial construction of the term "representatives" in general at the time of the amendment, and the court incorrectly cited two cases which do not even discuss the VRA. *Id.* (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (Supremacy Clause and nuclear power plant operator's entitlement to worker's compensation); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987) (Tort Claims Act and malicious prosecution suit)).

In contravention of the *LULAC* court's conclusion, Congress is presumed to have known of the judicial constructions of Section 2 at the time of the amendment. *Cf.* *Office of Workers' Compensation Programs v. Perini N. River Assoc.*, 459 U.S. 297, 320 (1983) (Congress presumed to be aware of previous judicial rulings under unamended Act); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Congress presumed to be aware of judicial interpretation of earlier laws); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 187 (1959) (Congress presumed to be aware of earlier antitrust laws in passing new law prohibiting railroad monopolies). At the time of the amendment to Section 2, no court had excluded judges from Section 2 coverage. See *LULAC*, 914 F.2d at 652 (Johnson, J., dissenting) ("No previous court has ever even suggested that judicial elections might be exempt from the reach of Section 2 of the VRA."); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 514 (M.D. Ala. 1989) (every trial and appellate court which ruled on issue found judges covered by Section 2). See also, e.g., *Uvalde Consol. Indep. School Dist. v. United States*, 451 U.S. 1002 (1981) (at-large system discriminated against minorities); *McMillan v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981) (black residents prevented from electing black candidates to three governing bodies), *cert. dismissed sub. nom.* *Pensacola v. Jenkins*, 453 U.S. 946 (1981); *Nevett v. Sides*, 571 F.2d 209 (1978) (minorities unfairly discriminated against in municipal elections), *cert. denied*, 446 U.S. 951 (1980).

⁶⁰ See *Mallory v. Eyrich*, 839 F.2d 275, 279-280 (6th Cir. 1988). In *Mallory*, the Sixth Circuit refused to accept a restrictive meaning of the word "representatives," explaining that such treatment of the word is not at all consistent with the application-expanding purpose of the 1982 amendment. *Id.* "We can find no basis in the language or legislative history of the 1982 amendment to support a holding that the use of the word 'representatives' was intended to remove judicial elections from the operations of the Act." *Id.* at 280.

In *Southern Christian Leadership Conference v. Siegelman*, an Alabama district court as-

Unjust Elections of State Judges

Examination of the VRA's purpose supports this latter argument.⁶¹ As the majority conceded, the VRA is a remedial act.⁶² Thus, fundamental rules of statutory construction mandate that a court interpret it broadly.⁶³ An expansive reading advances the

serted that to conclude that Congress, in an attempt to expand application of the Act, would utilize the term "representatives" once and, without explanation or clarification, with a desire that it be construed restrictively, is absurd. See *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 517 (M.D. Ala. 1989).

Likewise, in *Martin v. Allain*, a Mississippi district court declared that the word "representatives" applies to "anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges." *Martin v. Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987) (emphasis added). The court concluded that a state must adhere to the VRA in conducting judicial elections. *Id.* See also Note, *State Judicial Elections*, *supra* note 2 *passim* (broad term indicates expansion, not constriction).

⁶¹ See *infra* note 98 (discussing VRA's purpose). Cf. *Mallory v. Eyrych*, 839 F.2d 275, 280 (6th Cir. 1988) (legislative history and congressional policy favor expansive reading); *Chisom v. Edwards*, 839 F.2d 1056, 1060 (5th Cir.) (Act's purpose, to expand protection from racial discrimination supports including judges in Section 2), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.* 111 S. Ct. 775 (1991); Note, *State Judicial Elections*, *supra* note 2, at 799 (since Act's purpose was to expand voters' rights and decrease discrimination, construing "representatives" broadly is most suitable).

As a general rule of statutory construction, the Supreme Court typically interprets statutes to advance the congressional purpose in enacting the statutes. See, e.g., *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (interpreting Internal Revenue Code, Court looked for construction "most harmonious with its scheme and with the general purposes that Congress manifested") (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part, dissenting in part)); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1982) (Court interpreted Gun Control Act "in light of the purposes Congress sought to serve") (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)).

⁶² See *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (Supreme Court policy that VRA is remedial in nature); *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) ("Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant"). Cf. *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (Section 2 in particular advances guarantees of fifteenth amendment).

⁶³ See *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 122-23 (1978) (Act's remedial goals and legislative history urge broad reading to effectuate Congress' purpose); *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (Act so broad that "Congress intended to reach any state enactment which altered the election law of a covered State in *even a minor way*") (emphasis added); *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (to fulfill congressional intent "to rid the country of racial discrimination," Act must be broadly construed).

A traditional canon of statutory construction is that remedial statutes are to be liberally construed. See, e.g., *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977) (Longshoremen's and Harbor Workers' Compensation Act construed broadly to remedy longshoreman's injuries); *Peyton v. Rowe*, 391 U.S. 54, 64 (1968) (federal habeas corpus statute is remedial in nature and should be liberally construed); *Tcherepuin v. Knight*, 389 U.S. 332, 336 (1967) (finding Securities Exchange Act to be remedial legislation, Court interpreted it broadly "to effectuate its purposes").

Act's purpose of ending racial discrimination in voting procedures.⁶⁴ Under such a broad interpretation of the term "representatives," state judicial elections must fall within the scope of Section 2's coverage.⁶⁵

Unfortunately, the majority dismissed this important legislative history and conflicting court interpretations.⁶⁶ As a result, it is submitted that the majority, in effect, engaged solely in a plain meaning interpretation of the statute.⁶⁷ However, even a plain meaning interpretation should not have produced the majority's conclusion.⁶⁸

B. "Plain Meaning" Interpretation of "Representative" Under Section 2

A correct "plain meaning" interpretation of a statute would examine that statute as a whole.⁶⁹ Consequently, the majority should

Even before the VRA was passed, the Supreme Court liberally granted the right to vote and reinstated some aggrieved voters' claims which lower courts had refused to hear. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("history has seen a continuing expansion of the scope of the right of suffrage in this country"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (challenges on constitutionality of Georgia's congressional districting statute held to be justiciable question); *Gray v. Sanders*, 372 U.S. 368, 380-81 (1963) (upheld constitutional claim that state's county-unit system for primary was tantamount to election).

⁶⁴ See *supra* note 61 and *infra* notes 90-98 (discussing VRA's purpose).

⁶⁵ See *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988) (applying "representatives" narrowly "is completely inconsistent with the purpose of the amendment to expand the application of the Act"); *Chisom v. Edwards*, 839 F.2d 1056, 1063 (5th Cir.) (construing "representatives" in broad, untraditional sense to further Act's purpose), *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991); *Clark v. Edwards*, 725 F. Supp. 285, 307 (M.D. La. 1988) (broad construction of "representatives" based on Constitution and VRA).

⁶⁶ See *supra* notes 41 & 47-65 and accompanying text (conflicting court interpretations and VRA's legislative history, respectively).

⁶⁷ See JONES, KERNOCHAN & MURPHY, *LEGAL METHOD*, 388, 389 (1980) (discussing "plain meaning" interpretation); Murphy, *Old Maxims Never Die: The "Plain-Meaning" Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975) (even under plain meaning rule there are many ways in which court can look at legislative history).

⁶⁸ See *infra* notes 69-89 and accompanying text (plain meaning analysis of "representative").

⁶⁹ See *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The Supreme Court noted that "in expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). See also *Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.").

Unjust Elections of State Judges

have considered the term "voting," contained in Section 2, as it is defined in Section 14.⁷⁰ Section 14 defines "voting" as the practices and procedures for the election of "candidates for public and party office."⁷¹ Since elected state judges are clearly candidates for public office, it follows that Section 2 must include the election of state judges.

Furthermore, viewing a statute as a whole requires a court to read its particular sections together.⁷² Accordingly, since both Sections 2 and 5 address voting procedures and practices,⁷³ they should be read and applied together. Section 2 sets forth the voter's fundamental right to have an unfettered opportunity to elect a minority official if the voter so chooses,⁷⁴ while Section 5 requires that any new or amended state voting procedure be precleared by the United States Attorney General to prevent racial discrimination.⁷⁵ Recently, in *Georgia v. Brooks*,⁷⁶ the Supreme Court confirmed that Section 5 applies to state judicial elections.⁷⁷

⁷⁰ See *id.* See also *Mallory v. Eyrich*, 839 F.2d 275, 278 (6th Cir. 1988) (broad purpose advanced by applying Section 14 definition to Section 2); *Clark v. Edwards*, 725 F. Supp. 285, 307 (M.D. La. 1988) (borrowing Section 14 definition expands Section 2's coverage to state appellate judges). Cf. Note, *State Judicial Elections*, *supra* note 2, at 805 (Section 14 argument is "plausible").

⁷¹ Voting Rights Act of 1965, 42 U.S.C. § 1973(c)(1) (1982). This section defines "voting" as "all action necessary to make a vote effective in any . . . election . . . [of] candidates for public or party office" *Id.*

⁷² See *supra* note 69 (must read statute in its entirety). Cf. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (noting that "internal inconsistencies in the statute must be dealt with").

⁷³ See *Clark v. Edwards*, 725 F. Supp. 285, 307 (M.D. La. 1988) (suggesting Sections 2 and 5 may be applied in tandem); Note, *State Judicial Elections*, *supra* note 2, at 804-05 (Section 5 analogized to Section 2). Cf. *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988) (identical language of both sections supports utilizing both Sections 2 and 5 to end racial discrimination). But see *Chisom v. Edwards*, 659 F. Supp. 183, 187 (E.D. La. 1987) (analogy flawed because Section 5 not restricted to elections of representatives), *rev'd*, 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), *overruled*, *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S. Ct. 775 (1991); *Kirksey v. Allain*, 635 F. Supp. 347, 349 (S.D. Miss. 1986) (Sections 2 and 5 do not work together to end discrimination in judicial elections).

⁷⁴ See Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982).

⁷⁵ See Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982). Applicability of Section 5 is not made controversial by the term "representatives," because such term is not in the provision. *Id.*

⁷⁶ 111 S. Ct. 288 (1990).

⁷⁷ See *Brooks v. Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990) (one-line affirmation of district court ruling that Section 5 applies to state judiciary). This ruling dispels the controversy federal courts have had concerning the applicability of Section 5 to the state

Therefore, since both of the sections are meant to effectuate the VRA's goals, Section 2 should work with Section 5 to end racial discrimination in judicial elections and should, analogously, be made applicable to state judicial elections.

Such construction not only comports with statutory rules of construction, but also furthers the VRA's remedial purpose and avoids an anomalous result. As the concurrence noted, failure to apply both Sections 2 and 5 to judicial elections would lead to the "incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if the state sought to introduce that very procedure as a change from existing procedures it would be subject to Section 5 preclearance and could not be implemented."⁷⁸ The Supreme Court's recent confirmation in *Brooks* that Section 5 does apply to judicial elections⁷⁹ renders this argument even more compelling.

In general, the majority's "plain meaning" interpretation is flawed, for as the dissent insightfully noted, it seemingly equated "representative" with "advocate."⁸⁰ Such a construction both violates the term's actual plain meaning⁸¹ and legislative history,⁸² and leads to absurd results.⁸³ First, as the dissent noted, not all representatives are advocates.⁸⁴ For example, many other elected officials whom the majority would label "representatives," such as a mayor or county sheriff, would grossly defy their office duties if they performed in an advocacy manner.⁸⁵ Second, after equat-

judiciary. See, e.g., *Haith v. Martin*, 618 F. Supp. 410, 413 (D.N.C. 1985) (Section 5 applies to state judicial elections), *aff'd mem.*, 477 U.S. 901 (1986).

⁷⁸ *LULAC*, 914 F.2d at 645 (Higginbotham, J. concurring).

⁷⁹ See *supra* note 77 and accompanying text (discussing *Brooks v. Georgia*).

⁸⁰ See *LULAC*, 914 F.2d at 654 (Johnson, J., dissenting). The majority concluded that since a judge has no constituents, he does not act in a partisan matter, and therefore, is not a representative. *Id.* at 628.

⁸¹ See *supra* notes 69-79 and *infra* notes 82-89 and accompanying text (plain meaning analysis of "representative"). See also *LULAC*, 914 F.2d at 638 (Higginbotham, J., concurring) ("The plain language of Section 2 reaches judicial elections.").

⁸² See *supra* notes 47-68 and accompanying text (discussing VRA's legislative history).

⁸³ See *infra* notes 84-86 and accompanying text (absurd results explained). See also *United States v. Turkette*, 452 U.S. 576, 580 (noting "requirement that reviewing court avoid statutory interpretations that lead to an absurd result").

⁸⁴ See *LULAC*, 914 F.2d at 654 (Johnson, J., dissenting).

⁸⁵ See *id.*

Unjust Elections of State Judges

ing “representative” with “advocate,” the majority wrongfully concluded that, since judges are not advocates but merely impartial interpreters of the law, there is no need to apply Section 2.⁸⁶

While it is true that judges must act impartially in performing their jobs, the majority simplistically implied that there is no choice to make in judicial elections.⁸⁷ The very existence of an election, however, manifests that there is a choice to make, and shows the fallaciousness of the majority’s reasoning. Texas itself recognizes this choice by holding judicial elections to begin with. Otherwise, Texas simply could appoint candidate judges randomly. The truth of the matter is that different judges, though impartial, interpret laws differently. Moreover, the process of interpreting laws and deciding disputes often presents judges with the opportunity to reject or consider varying policy considerations. Hence, even amongst impartial interpreters of the law, there is a choice to make.

Thus, a proper examination of the plain meaning of the term “representative” would not confine this broad term to the narrow definition set forth by the majority. It is submitted that “representative” is a broad term which can include any elected government office not explicitly excluded,⁸⁸ which necessarily includes members of the judiciary.

III. APPLYING SECTION 2: DISSENT V. CONCURRENCE

While the concurrence agreed that judges are representatives under Section 2, and thus that Section 2 covers judicial elections in general, it nonetheless held that, due to the VRA’s purpose and the nature of a trial judge’s office, Section 2 does not cover elections for trial judges in particular.⁸⁹ It is suggested that close examination of the concurrence’s reasoning supports the dissent’s observations and reveals that the concurrence’s reasoning con-

⁸⁶ See *id.* at 628.

⁸⁷ See *id.* at 625-27, 628 (judges have no constituents, as they “speak the voice of law, and in doing so they speak for and to the *entire* community, never for segments of it and still less for particular individuals”).

⁸⁸ See *LULAC*, 914 F.2d at 656 (“representative” for VRA’s purposes “may be defined as anyone selected by popular election from a field of candidates to fill an office”).

⁸⁹ See *id.* at 645-46 (Higginbotham, J., concurring).

cerning the applicability of Section 2 rests on false premises. Furthermore, the conclusions drawn from these premises are equally faulty in nature. Accordingly, it is submitted that, like that of the majority, the concurrence's reasoning on this matter should be rejected, as Section 2 must apply to judicial elections.

A. *False Premises*

1. *The Purpose of the Voting Rights Act*

In accord with the dissent,⁹⁰ it is submitted that the concurrence simply misapprehended the VRA's true aim. As the dissent noted, the VRA's purpose was not to guarantee minorities the right to "have their interests represented in governmental decisions," as was asserted by the concurrence.⁹¹ Neither the VRA's plain language⁹² nor its legislative history⁹³ manifests this as its purpose. Furthermore, as the dissent noted, assuming this to be the VRA's true purpose would "lead to the absurd conclusion that a plaintiff could, pursuant to the Voting Rights Act, bring to task an elected official who has not, during his tenure in office, given proper deference to minority interests."⁹⁴ Hence, the concur-

⁹⁰ See *id.* at 658 (Johnson, J., dissenting).

⁹¹ *Id.* See *Solomon v. Liberty County*, 865 F.2d 1566, 1583 ("goal of Section 2 is not to maximize the political clout of minorities but rather to ensure minority representation in government"), *vacated*, 873 F.2d 248 (11th Cir. 1989). One commentator has illustrated the VRA's applicability by "[c]onsider[ing] an elected sheriff who makes a number of decisions that harm minority interests." Note, *Applying Section 2 of the Voting Rights Act to Single Member Offices*, 88 MICH. L. REV. 2199, 2246 (1990) [hereinafter "Note, Applying Section 2"]. "[W]hile sheriff's acts are discriminatory, the [VRA] does not apply because the [decision-making] conduct does not interfere with opportunities to participate in the political process." *Id.*

⁹² See *infra* note 5 (setting forth relevant language of VRA).

⁹³ See S. REP. NO. 417, 97th Cong., 2d Sess. 2, *reprinted* in 1982 U.S. CODE CONG. & ADMIN. NEWS 179 (inquiry of Section 2's "results" test is whether "political processes are equally open to minority voters"); 111 CONG. REC. 8295 (1965). This Senate Report manifests that the Voting Rights Act's purpose or aim was "not only to correct an active history of discrimination, the denying of Negroes of the right to register and vote, but also to deal with the accumulation of discrimination." *Id.* See also *Beer v. United States*, 425 U.S. 130, 140 (1976). In *Beer*, the Supreme Court noted that "[t]he legislative history reveals that the basic purpose of Congress in enacting the Voting Rights Act was 'to rid the country of racial discrimination in voting.'" *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)).

⁹⁴ *LULAC*, 914 F.2d at 658, n.13. *Cf. Schweiker v. Wilson*, 450 U.S. 221, 243 (1981). "The deference to which legislative accommodation of conflicting interests is entitled rests

Unjust Elections of State Judges

rence's belief as to the VRA's purpose is completely unfounded.

Moreover, it is submitted that, in a majoritarian democracy, no law as basic as the VRA could possibly guarantee that minorities would "have their interests represented in governmental decisions."⁹⁵ In a majoritarian democracy, the principle that "majority rules," almost by definition, results in the majority rejecting the minority's influence.⁹⁶ Hence, a law such as the VRA, which

upon the principle that the political process of our majoritarian democracy responds to the wishes of the people." *Id.*

⁹⁵ *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring). See *Jeffers v. Clinton*, 730 F. Supp. 196, 233 (E.D. Ark. 1990) (Eisele, C.J., concurring in part, dissenting in part). "[I]n one sense, it can be stated that majoritarian democracy always discriminates against political minorities." *Id.* "[C]ourts may not constitutionally prohibit, or do away with majoritarian democracy as a remedy for violations of Section 2." *Id.* at 259. See also A. LIJPHART, *DEMOCRACIES* 4 (1984). Professor Lijphart posited that, "[t]he essence of the [majoritarian] model [of democracy] is majority rule." *Id.* See generally BLACK'S LAW DICTIONARY 955 (6th ed. 1990). "Majority rule" is defined as "[r]ule by the choice of the majority of those who actually vote . . ." and "majority" is defined as the number greater than half of any total. *Id.*

In Texas, to win a seat for most public offices, a candidate must simply receive more votes than any other candidate. See TEX. ELEC. CODE ANN. §2.001 (Vernon 1986). Some other offices, however, require a candidate to win a majority of the votes cast, in which case a run-off election is held between the two top vote receivers when no candidate receives a majority. See TEX. ELEC. CODE ANN. §2.021 (Vernon 1986). Furthermore, passing a law in Texas simply requires a majority of those present in the legislative quorum to vote for it. See TEX. CONST. art. III. See also *LULAC*, 914 F.2d at 631 (majority characterizing our nation's political system as "majoritarian political game"). Hence, in light of these definitions and interpretations, it is fair to conclude that Texas is a "majoritarian democracy."

⁹⁶ See *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1937). In this highly renowned footnote, Justice Stone recognized the realities of majoritarian democracies, questioning "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should be subject to greater judicial scrutiny. *Id.* More specifically, he implied that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities," thus requiring greater judicial scrutiny. *Id.*; J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-87 (1980). Relying on *Carolene Products'* famous footnote four, Professor Ely challenged the "majority rule" concept, authorizing courts to interfere with defective legislative processes which wrongfully deny a group sufficient representation in that process. *Id.* See also Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1284 (1984). Noting the application of *Carolene Products'* footnote four "to remedy the structural imperfections of the legislative marketplace," the author asserted that:

Unfortunately, judges cannot vindicate minority rights simply by protecting the right to vote. Policing against malapportionment and franchise restrictions is insufficient because those with the most votes are in a position to vote themselves advantages at the expense of the others, or otherwise refuse to take their interests into account.

Id. The author further stated that, "[p]art of the appeal of the majority-rule principle lies in its guarantee that, on any given issue, there will be more winners than losers," but, "[i]f certain groups almost always find themselves on the losing end of important votes, then

merely guarantees minorities the opportunity to elect their fair share of governmental representatives, could not possibly guarantee that those representatives would actually "influence governmental decisions."⁹⁷ Thus, while minority representation may, directly or indirectly, result in governmental influence, the VRA does not secure such influence. Rather, as the dissent noted, the VRA is simply aimed at granting minorities equal access to the electoral process.⁹⁸

majoritarianism may mask a tyranny that consistently rewards some citizens by oppressing others." *Id.* at 1284 n.4. Lastly, he contended that "the reality of [*Reynolds v. Simms*] is that when representatives are selected by majority rule, the votes of those in the minority do not truly count." *Id.* at 1290. Accord Abrams, "Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. REV. 449, 485 (1988) ("minority neglecting aspects of majoritarian democracy"); Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 456 (1987) ("impoverished and powerless minority lives side by side with an affluent majority that has the votes and therefore the power to do as it pleases."). One scholar has noted that, "the majoritarian interpretation of the basic definition of democracy is that it means 'government by the majority of the people . . . [but] majority rule and the government-versus-opposition pattern of government that it implies may be interpreted as undemocratic because they are principles of exclusion.'" LIJPHART, *supra* note 95, at 21. See also Note, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1502 n.196 (1987). The author noted that, "the electoral process can produce results that infringe the interests of groups which are not well represented in the political process," and that, "a legislative body will often serve the interests of the narrow electorate even at the expense of the constitutional rights of others." *Id.* In short, "[p]ure democracies are inherently unstable and permit the majority interest to oppress minorities." THE FEDERALIST No. 10, at 59-60 (J. Madison). Cf. THE FEDERALIST No. 10, No. 51 (A. Hamilton) (Hamilton wary of legislative tyranny of majority). See generally *supra* note 95 (setting forth definition and general discussion of concept of "majority rule").

⁹⁷ LULAC, 914 F.2d at 651 (Higginbotham, J., concurring). See Abrams, *supra* note 96, at 501 ("The presence of minority officials and the formal opportunity for interaction appear to be necessary, but not sufficient, conditions for minority influence in political decision-making.") But see Howard & Howard, *The Dilemma of the Voting Rights Act - Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1631 n.61 (1983) ("[I]ncreased minority participation in the legislative process will increase legislative responsiveness to minority interests, thus yielding legislation that more accurately reflects the interests of the society as a whole.").

⁹⁸ See LULAC, 914 F.2d at 658 (Johnson, J., dissenting). See also *Thornburg v. Gingles*, 478 U.S. 30, 44 n.9 (1986). The Court observed that, "[a]s the Senate Report notes, the purpose of the Voting Rights Act was 'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Id.* (quoting 111 CONG. REC. 8295 (1965)); Fullilove v. Klutznick, 448 U.S. 448, 546 (1980) (VRA addressed problem of discriminatory denial of access to electoral process); *United States v. Mississippi*, 444 U.S. 1050, 1051 (1980) (under VRA, court should determine only whether there has been abridgement or denial of right to vote on account of race or color); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 50 n.4 (1978) (Powell, J., dissenting) ("To be sure, the purpose of the Voting Rights Act was to 'banish the blight of racial discrimination in voting' in selected States." (quoting

Unjust Elections of State Judges

2. Single-Member Offices

Consistent with the dissent, it is submitted that the second premise underlying the concurrence's reasoning, that Texas district judges hold "single-member" offices, is also erroneous.⁹⁹ The dissent first objected to this premise on the grounds that "[n]othing in the language of Section 2 suggests that a reviewing court should concentrate on the type of election [office] under dispute."¹⁰⁰ However, notwithstanding the propriety of such a focus, it is further submitted, as the dissent itself then observed, that the

South Carolina v. Katzenbach, 383 U.S. at 308)); South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."); Collins v. City of Norfolk, 883 F.2d 1232, 1237 (4th Cir. 1989) (VRA's purpose is one "of securing equal opportunity for minorities to elect the representatives of their choice"); McCord v. City of Fort Lauderdale, 787 F.2d 1528, 1536, *vacated*, 804 F.2d 611 (11th Cir. 1986). Judge Swygert noted in dissent that "[t]here is no question that the underlying purpose of the 1982 Voting Rights Act Amendments is to insure that 'political processes are equally open to minority voters.'" *Id.* (quoting S. REP. NO. 417, 97th Cong., 2d Sess. 2, *reprinted* in 1982 U.S. CODE CONG. & ADMIN. NEWS 179).

⁹⁹ See *LULAC*, 914 F.2d at 647-48 (Higginbotham, J., concurring). A single-member office has been defined as "a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area." Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511, 518 (M.D. Ala. 1989). The concurrence in *LULAC* acknowledged this definition, yet nonetheless rejected it:

The [Siegelman] court found that exclusive authority alone does not define single-member official. We disagree with this view of multi-member versus single-member office and agree with the argument made by defendants in *Siegelman* that "the hallmark of a single-member office . . . is not the fact that the office is traditionally held by only one individual but, more importantly, the fact that the full authority of that office is exercised exclusively by one individual."

LULAC, 920 F.2d at 648 (quoting *Siegelman*, 714 F. Supp. at 518). By adopting the *Siegelman* defendant's definition, the concurrence introduced a complicated definition which ignored the term's true and simple meaning and which the *Siegelman* court itself rejected, noting that "[t]he defendants [presenting this definition] offer no rationale for their alternative definition" *Id.* Secondly, the *Siegelman* court reiterated that "the true hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can be divided no smaller [W]hat is important is how many positions there are in the voting jurisdiction." *Id.*

¹⁰⁰ *LULAC*, 914 F.2d at 657 (Johnson, J., dissenting). Judge Johnson contended that: Despite Congress' clear statement that the Voting Rights Act applies to all voting, the concurrence, through rhetoric surrounding the term "representative," attempts to shift attention from the one casting a vote to the one for whom the vote is cast. Not one word or thought contained in Section 2(a) or (b) supports, or is suggested by the concurrence in support, of this effort Nothing in the language of Section 2 suggests that a reviewing court should concentrate on the type of election under dispute— whether it is for a mayor, an alderman, a legislator, a constable, a judge or any other kind of elected official.

Id.

concurrence misunderstood what the term "single-member office" really signifies.¹⁰¹

Relying on *Butts v. City of New York*,¹⁰² the concurrence seemingly concluded that, because a district judge is not a member of a multi-member decision-making body, he holds a single-member office.¹⁰³ However, as the dissent perceptively noted, the conclusion that judges do not belong to a multi-member decision-making body, but instead decide cases alone, does not warrant the conclusion that they hold single-member offices.¹⁰⁴

While acknowledging that there are many judges with overlapping jurisdictions, the concurrence nonetheless insisted that judges hold single-member offices because there is "no overlap-

¹⁰¹ See *id.* at 657 (Johnson, J., dissenting). Cf. *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987) (VRA given "broadest possible scope.") (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

¹⁰² 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). In *Butts*, the plaintiffs, representing a group of minority voters living in New York City, challenged a New York statute which required a run-off election for three city offices, including the mayoral office. *Id.* at 143. The court held that, where no party candidate receives greater than 40% of the vote, a run-off requirement for a single-member-office does not deny any class an opportunity of equal representation, and therefore does not violate the VRA. *Id.* at 149.

¹⁰³ See *LULAC*, 914 F.2d at 647-48 (Higginbotham, J., concurring). The concurrence stated that "viewing judges as members of a multi-member body is flawed in concept," because "once a case is assigned, it is decided by only one judge." *Id.* at 649. After describing judicial offices as those "filled by one person," it contrasted such an office with a multi-member body and concluded that the judicial office was a single-member office. *Id.* The concurrence noted the judges' "character as single-office holders instead of members of a multi-member body." *Id.*

¹⁰⁴ See *id.* at 661 (Johnson, J., dissenting). Judge Johnson posited that "[w]hether an office-holder wields his power in an individual or collegial manner is simply not the relevant inquiry." *Id.* at 662. Furthermore, he insightfully noted:

In its broadest sense, the concurrence's conception of the "single officeholder exception" states absolutely nothing. Every officeholder is a single officeholder; no position is shared by more than one person. Every officeholder exercises complete authority over the duties of his or her office. To say that a district judge in Texas exercises full responsibility over his office simply does not advance the analysis. Every state legislator exercises full responsibility over his or her office; in that respect the legislator is no different from a judge. Every county sheriff exercises full responsibility over his or her office; in that respect the county sheriff is no different from a judge.

Id. at 661. Accordingly, Judge Johnson noted that, "[t]he question [under the single officeholder analysis] is not whether a judge can be subdivided, . . . but rather whether the judiciary can be subdivided . . ." *Id.* Hence, under the single-member office exception, the inquiry is not whether a particular officeholder exercises full responsibility over his or her office, but whether, in a given district, there is more than one person holding such an office. See Note, *Applying Section 2*, *supra* note 91, at 2200 (in single-member office, "greater power is concentrated in one individual and no comparable office exists in the jurisdiction"); *supra* note 99 (definition of single-member office).

Unjust Elections of State Judges

ping in decision-making.”¹⁰⁶ Yet, the type of decision-making implicit to an office does not determine its characterization as single-member, but is merely a result of that status.¹⁰⁶ As the dissent suggested, decision-making was not at issue in *Butts*, as “*Butts* stands for nothing more than the unremarkable proposition that in certain electoral situations, there exists only one relevant office for the whole electorate.”¹⁰⁷ The challenged counties, however, each contain more than one judge.¹⁰⁸ As such, a conclusion that the concurrence misunderstood *Butts*’ rationale is warranted.¹⁰⁹

Contrary to the concurrence’s viewpoint, it is additionally sub-

¹⁰⁶ *LULAC*, 914 F.2d at 648 (Higginbotham, J., concurring). See *supra* note 99 (detailing concurring opinion’s discussion of members of judiciary as single-member office holders).

¹⁰⁷ See *LULAC*, 914 F.2d at 661 (Johnson, J., dissenting). The fact that there is no overlap in decision-making is not the quality which renders an office “single-member,” but it is instead submitted that exclusive decision-making is simply a consequence of an office being “single-member.” This reality is clear when viewed in light of Judge Johnson’s observation that “[e]very officeholder exercises complete authority over the duties of his or her office.” *Id.* See also *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 (M.D. Ala. 1989). The defendants in *Siegelman* were similarly confused as to the real definition of a single-member office. *Id.* The *Siegelman* court thus observed:

The defendants’ confusion as to the true implications of the concept of single-member offices possibly arises from the fact that, in most cases, any officeholder who wields his authority independently will coincidentally also be the only holder of his position in the entire geographic area. For example, it is unheard of to have more than one governor for the same state, or more than one mayor for the same city; coincidentally, these are also positions where the full authority is exercised exclusively by one individual. Examination of *Butts* . . . and the instant case demonstrates that these two characteristics do not always co-exist, and that when they do, they do so only by coincidence. Accordingly, this court is of the opinion that the defendants are incorrect when they extrapolate the latter characteristic from the former as a prerequisite for Section 2 applicability.

Id. (footnote omitted).

¹⁰⁷ *LULAC*, 914 F.2d at 661 (Johnson, J., dissenting). Judge Johnson concluded that, “[i]n effect, the at-large boundaries [in *Butts*] coincide with the only “district” boundaries possible; because there is only one position to be filled, it becomes impossible to split up the jurisdiction any smaller.” *Id.* at 662 (citing *Siegelman*, 714 F. Supp. at 519-20 (footnotes omitted)). See also *supra* note 102 and *infra* note 109 (discussing *Butts* decision).

¹⁰⁸ See *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring) (“this suit attacks only the nine counties with multiple district judges”). See also *infra* note 109 (election within discrete geographic areas of as many as fifty-nine judges).

¹⁰⁹ See *LULAC*, 914 F.2d at 662 (Johnson, J., dissenting). The dissent noted:

The *Butts* exception is premised simply on the number of officials being elected (one), the unique responsibilities of that office, and the impediment to subdividing that single position so that minority voters have the opportunity to elect a “share.” In the instant case, however, this Court is not concerned with the election of one single member position; rather, this Court is concerned with the election within discrete geographic areas, of as many as fifty-nine judges with virtually identical functions.

Id. But see *id.* at 647-50 (Higginbotham, J., concurring) (interpreting *Butts*).

mitted that one can view Texas district judges as members of a multi-member decision-making body.¹¹⁰ The concurrence itself acknowledged certain instances where district judges often do act in concert and do share duties.¹¹¹ Moreover, while judges might not influence each other as directly as legislators might influence each other during debate, judges do necessarily influence each other through *stare decisis* and judicial comity.¹¹²

B. *Illogical and False Inferences*

Even ignoring the false premises relied on by the concurrence, critical examination reveals that the conclusions reached do not logically follow, and are simply erroneous.

1. *The Purpose of the Voting Rights Act*

Assuming, *arguendo*, that Section 2's purpose was to secure minority influence in governmental decision-making, this premise does not permit the inference that Section 2 does not apply to judicial elections. Analogously, one could argue that Section 2 does not apply to any elections, since, as previously noted, majoritarian democracies often nullify minority representatives' ability to influence government decisions.¹¹³ Clearly, both the underlying argument and the underlying analogy are fallacious at best, as both effectively dismantle Section 2. Secondly, the concurrence's suggestion that at-large elections behoove the minority population by enabling it to vote for, and thereby influence, all of

¹¹⁰ *LULAC*, 914 F.2d at 648 (Higginbotham, J., concurring).

¹¹¹ See *id.* at 647. Judge Higginbotham noted that, under Texas' Special Practice Act, "cases can be freely transferred between judges and that any judge can work on any part of a case including preliminary matters." *Id.* In addition he noted that "the local administrative judge is elected by a majority vote of all the judges in the county" *Id.* The dissent agreed, noting that "the concurrence's conclusion [that only one individual exercises the full authority of a trial judge's office] is at odds with the true structure" of Texas' judicial system. *Id.* at 662 n.19. In this light, it is fair to conclude that district judges in Texas do sometimes share responsibilities and act as a collegial body.

¹¹² See *infra* notes 115-16 (definition and significance of doctrines of *stare decisis* and judicial comity, both of which provide very significant means by which judges influence each other, even when deciding cases alone).

¹¹³ See *supra* notes 95-96 and accompanying text (minority often left powerless in majoritarian democracy). See also *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986) (discussing majority's ability to affect outcome of elections).

Unjust Elections of State Judges

the judges in a district¹¹⁴ also does not justify excluding Section 2. This argument could similarly be made about legislative elections: in a majoritarian democracy, it is much better to vote for, and thereby have influence over, all legislators rather than to elect a few representatives whose ideas the majority will inevitably disregard anyway. Since this scenario so clearly repugns the VRA altogether, such reasoning begs rejection.

Most significantly, it is simply untrue that the plaintiffs in *LU-LAC* had nothing to gain through the application of Section 2. The concurrence's conclusion that minority populations in general have nothing to gain grossly ignores the great impact that even one minority-elected judge can have through the legal doctrines of stare decisis¹¹⁵ and judicial comity.¹¹⁶ Moreover, in this

¹¹⁴ See *LULAC*, 914 F.2d at 649 (Higginbotham, J., concurring). Judge Higginbotham noted that subdistricting, "may well lessen the minority influence instead of increase it [for] the current system of electing state judges at least permits voters to vote for each and every judicial position within a given district" *Id.* Hence, "[i]t is more likely, therefore, that minority voters will have some influence on the election of each judge." *Id.* Thus, he concluded that "electing judges from single member districts only increases the likelihood that a small number of governmental decisions will be influenced by minority interests, while minority interests will not be represented at all in the majority of judicial decisions." *Id.* at 651.

¹¹⁵ See generally *BLACK'S LAW DICTIONARY* 1406 (6th ed. 1990). "Stare decisis" is defined: "to abide by, or adhere to, decided . . . cases." *Id.* Black's also defines stare decisis as the "[p]olicy of courts to stand by precedent and not to disturb settled point." *Id.* (citing *Neff v. George*, 4 N.E.2d 388, 390-91 (Ill. 1936)). Black's also describes it as the "[d]octrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same" *Id.* (citing *Horne v. Moody*, 146 S.W.2d 505, 509 (Tex. Civ. App. 1940)). Thus, any Texas judge interpreting the law greatly influences governmental decision-making, since the doctrine of stare decisis requires fellow judges within Texas to follow his/her interpretation of the law, such that one judge can create a precedent which all other judges in Texas must follow. See *Patterson v. McLean Credit Union*, 419 U.S. 164, 171 (1989). In *Patterson*, the Supreme Court held that, "it is indisputable that stare decisis is a basic self governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Id.* (quoting *THE FEDERALIST* No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1988)). See also *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 494 (1987) ("[s]tare decisis is of fundamental importance to the rule of law").

¹¹⁶ See generally *BLACK'S LAW DICTIONARY* 267 (6th ed. 1990). "Judicial comity" is defined as "the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decision of another" *Id.*

Moreover, aside from the great impact a single judge can have through stare decisis and judicial comity, the dissent also noted that a single minority judge can serve as a role model for minority group members, encouraging minority voting and election participation. *LU-LAC*, 914 F.2d at 659 n.14 (Johnson, J., dissenting). Conversely, "[p]ersistent minority de-

light, it is asserted that one judge is much more valuable to a minority segment than any single legislator in a majoritarian democracy could ever be. In fact, courts have long been regarded precisely as protectors of the minority from the "tyranny of the majority."¹¹⁷ Accordingly, if Section 2's applicability depends upon what the minority population has to gain, as the concurrence implies, it could clearly be argued that, if anything, Section 2 is much more appropriately applied to judicial elections than to legislative elections.¹¹⁸

Finally, the concurrence stated that its decision respected Texas' desire for coterminous jurisdictional and electoral bases, so as to ensure accountability of the judiciary.¹¹⁹ It manifested a concern that "[s]ubdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate," contrasting the situation with members of larger bodies elected from subdistricts, where "the interests of all the electors are still represented in each decision."¹²⁰ As previously noted, it is not always the case that all electors' interests are represented in each decision.¹²¹ As such, it is submitted that, once

feat . . . leads to apathy among minority voters and a feeling of exclusion from the opportunity to join in the political process of self-government." *Id.*

¹¹⁷ THE FEDERALIST No. 10, No. 51 (A. Hamilton). See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (concern expressed for "those relegated to such a political powerlessness as to command extraordinary protection from the majoritarian political process"); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 962 n.116 (1987) (Justice Stone, in his famous *Carolene Products* footnote, advocated Court's evaluating interests when legislative process could not be trusted); Bloch, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 336 (1986) ("[t]he judicial branch remained the only hope of the Federalists to contain the dangers of majoritarian democracy"); *supra* note 96 (Supreme Court, in *Carolene Products*' footnote, expressed concern for political power of "discrete and insular minorities").

¹¹⁸ See *supra* note 117 (courts long regarded as minorities' protectors).

¹¹⁹ See *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

¹²⁰ *Id.*

¹²¹ See *supra* notes 95-96 and accompanying text (minority often without influence in majoritarian democracy). The dissent asserted that judges presiding over persons not members of their jurisdiction is nothing new in Texas. Judge Johnson noted:

Under the existing system, it is highly probable that a case will be heard outside the county in which a litigant lives. In such a case, at least one — and probably both — of the parties will be appearing before a judge who was elected by a population which does not include that litigant [Texas venue rules] frequently require that an out-of-county resident appear before a judge for whom the litigant neither cast a vote for nor against Aside from the complexities of the Texas venue rules, there are many other occasions when a party may appear before a judge elected by the residents of another county. For example, district court judges are frequently

Unjust Elections of State Judges

again, the concurrence has overlooked the political realities of majoritarian democracies and failed to consistently apply its reasoning.

2. *Single-Member Offices*

Even assuming that Texas district judges are “single-member office” holders, this characterization should not have compelled the majority to conclude that Section 2 does not apply. By analogy, “traditional members” of the state’s executive branch, such as mayors, are themselves true single-member office holders, and yet even the majority admits that Section 2 applies to executive elections.¹²² Thus, it is submitted that characterization of an office as “single-member” does not alone control the applicability of Section 2.

CONCLUSION

In *LULAC*, the Court of Appeals for the Fifth Circuit narrowly construed Section 2 and entirely disregarded the VRA’s true purpose. Congress enacted the VRA to guarantee minorities equal access to the electoral process. By denying the plaintiffs the right to challenge the election of Texas district judges, the court excluded a significant governmental body from the VRA’s coverage. As a result, *LULAC* improvidently perpetuates minority discrimination by denying minority segments of our society equal access to the political process of state judiciaries.

Eileen Campbell & Robert R. Vidulich

called into other counties to help with docket control Additionally, Texas authorizes the use of retired or senior state district judges, who wield all the powers of their elected and active peers.

Id. at 668.

¹²² See *LULAC*, 914 F.2d at 622. The majority stated that Section 2 “extends . . . no further than the legislative and executive branches” *Id.* See Note, *Applying Section 2*, *supra* note 91, at 2213-15 (neither Congress nor Supreme Court mandated exemption of single-member offices from Section 2’s coverage).

